CHAPTER ONE

CLASSIFICATION IN PRIVATE LAW

INTRODUCTION

The idea of classification in law sometimes carries connotations of crudeness and artificiality.[1] This may be associated with the idea that it involves constructing a table or matrix that can be used to read off a legal solution for a set of facts in the way that one might use a railway timetable to find a train. This in turn may come from the association of legal classification with the discredited understanding of the law and legal reasoning that has been described as 'mechanical jurisprudence', according to which all legal questions can in principle be resolved by applying a settled rule of precise scope to the facts in question. Certainly tables or trees setting out schemes of legal classification were more common in the legal literature in the era of mechanical jurisprudence than they are nowadays.[2]

But classification is not intrinsically related to mechanical jurisprudence and it plays a crucial role in a sound understanding of the law, as in other areas of rational inquiry. Legal rules or principles or claims or causes of action or other such elements of the law may be described as contractual, tortious, proprietary, restitutionary, compensatory, fiduciary, or be said to be part of the law of obligations or private law or the law of wrongs or unjust enrichment, etc.

---

[1] See for example Stephen Waddams, *Dimensions of Private Law* (Cambridge, CUP, 2003), ch 1. This is a sceptical response to the revival of interest in classification sparked by the work of Peter Birks on unjust enrichment and restitution, as discussed further in chapter eight.

[2] For a discussion of some of these see Roscoe Pound, 'Classification of Law' 37 *Harvard Law Review* 933 (1923-24).

Abstract concepts like these are often used without explanation or elaboration in legal reasoning, and sometimes this is the cause of persistent confusion or controversy. One might say that the answer is simply to investigate the meaning, or to develop a theory, of the concept in question. But at least part of the solution to such problems can be found in considering the *kind* of concept in issue, and how it relates to other concepts or kinds of concept; in other words, in characterising the concept as a category in a scheme of classification that associates it with other equivalent concepts and then differentiates between them. For example, is contract the same type of category as tort, and if so what is the nature of the classification? What about property or restitution? This is a question of legal taxonomy or classification.[3] The significance of the classification depends on the role of that type of concept in legal reasoning.

Another source of hostility to the idea of classification comes from the misplaced idea that there must be a single, authoritative, one-dimensional classification, applicable for all purposes. In fact it is always possible to classify in different ways for different purposes, in the law as elsewhere. Animals can be classified by diet or habitat or by genetic or evolutionary proximity, for example, and the context determines which is appropriate. Sometimes there may be a dominant classification by an essential or defining characteristic – for example, genetic proximity for living things – but this is not necessarily the case and it does not preclude the use of other types of classification where appropriate. The misconception that in law all useful concepts must be forced into a single one-

[3] For the usage of 'classification' in law to mean construing a legal concept to place a certain case within or outside it, see Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford, OUP, 2005), 70-72.

dimensional scheme is another reason why legal classification has sometimes seemed crude and artificial. The purpose of this chapter is to identify various different types of legal classification, and some of the errors that can result from conflating them. The main types of classification that will be considered in this and subsequent chapters are classification by justification, by remedy, and by normative type or 'modality'.

A classification has a subject matter, and often one speaks simply of 'the law' as the subject matter and a classification of the law into areas or departments or categories. Sometimes the subject matter of the classification is taken to be particular elements of the law, such as rules or principles or claims or causes of action as mentioned above, or rights, relations, concepts, 'causative events'[4] and so on, and sometimes it may be more apt to speak of categories of these elements. I will generally refer to categories of claims, though I may sometimes refer simply to legal categories. This seems to me largely a matter of presentation, though sometimes it may be necessary to distinguish between different possible elements. By 'claim', I mean a right of action or remedial right.[5]

JUSTIFICATORY CATEGORIES

A justificatory classification

A good example to begin with is contract law. What sort of category is this? It would be widely agreed that contract law is about agreements and claims arising

[4] This is the element used by Birks, below,-- .

[5] Thus 'claim' should not be equated with 'assertion', nor with Hohfeldian 'claim-right'; see below p--.

from agreements. But, if this is so, why is it that claims arising from agreements are treated as part of a single category? Why is it that there is a recognised category of claims arising from agreements but not, say, a category of claims arising on a Tuesday? The answer must be that agreement is a significant concept because of the significance of the moral principle that agreements should be kept. Contract law is, I will say, a justificatory category,[6] meaning a category of claims arising by virtue of a body of rules based on a certain general moral principle.[7] This suggests that the traditional division in private law between contract law and tort law is part of a classification by justification. One might formulate the general principle underlying tort law as a principle of responsibility, or of reasonable care to avoid foreseeable harm to others. The underlying principle provides the basis for a body of rules by virtue of which a claim arises, and it is reflected in the characteristic concepts of the category and

[6] Justification refers to the moral basis of a body of law, not the source or authority of the rules. I will not discus whether the underlying general moral principles that I refer to should also be understood as legal principles, or if they are reflected in distinct legal principles. This is at the heart of the debate on positivism.

[7] Cf Michael Moore, 'Theories of Areas of Law' 37 *San Diego Law Review* 731 (2000); Michael Moore, *Placing Blame* (Oxford, Clarendon Press, OUP, 1997), ch 1. See also MacCormick, *ibid*, 113. Penner refers to categories based on interests: JE Penner, *The Idea of Property in Law* (Oxford, Clarendon Press, OUP, 1997), ch 3. The interests he has in mind seem to be interests in the application of an underlying principle. Penner understands his classification as an application of Raz's theory of individuation: Joseph Raz, *The Concept of a Legal System* (Oxford, OUP, 2nd edn, 1980). But the theory of individuation is concerned with identifying individual elements rather than the categories into which they might be classified. In particular Raz is concerned with defining a rule principally by reference to its source, as part of a system of authority, rather than by reference to its justification in the sense of underlying principle.

the framework of standard issues that arise in connection with claims under the category: for example in contract what sorts of agreement should be legally binding, how an agreement should be interpreted, what remedies should arise in the event that the agreement is not performed as agreed, etc, and in tort whether there is a duty of care, what the required standard of care is, etc. I will attempt to deal with some objections to this approach in the course of the discussion.

One important role of justificatory categories is to indicate the nature of the moral basis for a claim, free of technical detail. This role has no bearing on legal reasoning, but classification by justificatory category does also have a practical role in legal reasoning. I will come back to this after a brief discussion of aspects of legal reasoning.

Deductive and analogical legal reasoning

Often it is adequate to understand the law as of a body of rules and legal reasoning as the process of identifying the applicable legal rule and applying it to the facts in issue. On this view, legal reasoning is purely deductive or syllogistic – it involves showing that the facts in question fall within the scope of the rule and inferring that the rule applies. This is not to say that it is always straightforward. Technical skill and knowledge may be involved in identifying the relevant rules, for example where they have to ascertained from various statutory provisions or cases. Sometimes it has been thought that this is all there is to legal reasoning: the rules are certain in scope and exhaustive of possible issues. This is the approach referred to above as mechanical jurisprudence.

But of course often the problem is that the law is unsettled: there is a conflict between two rules that appear to apply, or there is no recognised rule at

all, or the applicable rule is ambiguous or vague, or it seems to have unfair or anomalous consequences in the circumstances. These problems cannot be solved by deductive reasoning and are concealed in the simple approach of mechanical jurisprudence.[8] I think it is reasonably uncontentious to say that, broadly speaking, the court deals with this problem by drawing on the rationale or justification of recognised rules to devise a new rule or modify an existing rule, and this is usually referred to as analogical reasoning.[9]

For example, where a court 'distinguishes' an earlier case that purports to govern the case at hand, the court qualifies the rule established by the earlier case on the ground that according to the rationale for the rule its formulation in the earlier case is too broad and should not apply to the present facts. Conversely, it may be that according to its current formulation a rule does not apply to the facts in issue, but its rationale suggests that it ought to. Then the court can extend the rule to cover the new situation. This may lead to the unification of analogous rules, or the subsumption of a rule into a more general rule.

Analogical reasoning presupposes that, even if an existing rule is not applicable to the facts in issue, its rationale should be accepted as a relevant

[8] This is the standard criticism of 'formalism': see eg Frederick Schauer, 'Formalism' (1989) 97 *Yale Law Journal* 509, 511-513.

[9] See eg Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford, OUP, rev edn, 1994), ch 7; Joseph Raz, 'Law and Value in Adjudication' in *The Authority of Law* (Oxford, Clarendon Press, OUP, 1979). The classic example of analogical reasoning is drawing an analogy between particular cases, which is narrower than analogical reasoning as stated. Some writers think of analogical reasoning as the application of a special sort of judgment or a faculty of moral intuition: see eg Lloyd L Weinreb, *Legal Reason* (Cambridge, CUP, 2005). This is not necessary for analogical reasoning as described.

consideration in formulating a rule to apply. This it presupposes the value of coherence. The principle of formal justice (as it is sometimes called) requires that like cases should be decided alike. Arguably the principle is fully satisfied if the law is formulated in terms of rules, because this means that a particular case is not decided in isolation but by reference to a generalisation that applies to other equivalent cases as defined by the rule. But analogical reasoning can be said to promote coherence in the sense of consistency at the deeper level of underlying rationales. Furthermore, coherence increases transparency and clarity by directing attention to the justification for rules rather than their mechanical application.

On one view, analogical reasoning as described above can be extended beyond the immediate rationales for particular rules to higher and higher levels of abstraction, drawing on theories about justificatory categories and about the law itself, reaching up to theories concerning the role of judges in the legal and political system and general theories of morality such as utilitarianism or moral rights. This is of course the approach associated with Ronald Dworkin,[10] and he refers to the process as justificatory or theoretical ascent.[11] This departs from the conventional idea of analogical reasoning, though it seems to be a natural extension of it.

[10] Ronald Dworkin, *Law's Empire* (London, Fontana, 1986).

[11] Ronald Dworkin, *Justice in Robes* (Cambridge, Mass, Harvard UP, 2006), 25, 53. Dworkin's approach incorporates arguments 'on the merits' as a dimension of what I am referring to as analogical reasoning, whereas on a conventional view of analogical reasoning the issue arises whether analogical reasoning excludes such arguments. It is unnecessary for present purposes to pursue this.

Some commentators are sceptical about the role of such general and abstract theorising, and about the assumption that the law is or ought to be pervasively coherent in some way, and regard analogical reasoning as a limited and localised technique for solving the problem of a gap or a conflict in the law.[12] For example, Sunstein extols the virtues of 'incompletely theorised' agreement, meaning that through localised analogies judges can give grounds for their decisions that do not risk disagreement on controversial general theories.[13] Another objection is that a judge dealing with a particular set of facts may not be well placed to consider all the issues relevant to a theory affecting a wide area of law or anticipate the ramifications of such a theory.[14]

It is difficult to see how unresolved issues are to be addressed if not by way of theoretical ascent, whatever difficulties this may sometimes involve. But, as Dworkin observes, even accepting his expansive view in principle, in the ordinary course judges will operate in a localised way, making limited modifications to specific rules, unless the resolution of the issue in front of them and the arguments presented to them compel them to consider more abstract theoretical issues.[15] I will use 'analogical reasoning' to include abstract theoretical arguments as well as 'low level' or incompletely theorised arguments.

Analogical reasoning can take place in the context of a justificatory category. In addressing an issue of unsettled law, the court might locate case law by reference to justificatory category and it might identify the underlying

[12] eg Raz, above n6.

[13] See Cass R Sunstein, *Legal Reasoning and Political Conflict* (New York, OUP, 1996), especially ch 2.

[14] This is the problem of partial reform: see Raz, above n--, 200-201.

[15] Dworkin, above n10, 54.

principle and use it to guide the interpretation and development of the law. Classification itself here plays no real part in analogical reasoning; it serves only to identify the relevant body of law. But classification by justificatory category can sometimes play a direct role in analogical reasoning.

Justificatory categories in analogical reasoning and errors of classification

In a case on unsettled law, in practice the first step is to allocate it to a justificatory category, which brings it under a framework that determines in general terms how it is addressed and resolved. This involves an assumption that the case is analogous to a standard case in the category, so that it should be governed by the same general principle. It does not necessarily involve any consideration of the underlying principle or rely on a theoretical understanding of the category. The court may simply judge in an impressionistic way that the case falls in the category and then try to develop and apply the law to it in a low-level, partly intuitive and 'incompletely theorised' way. In this way, classification by justificatory category has a direct role in analogical reasoning.

This process depends on a distinction between what might be called 'true justificatory categories' and 'conventional-justificatory categories'. For example, to take the case of contract, in the conventional-justificatory sense 'contract' refers to an established body of rules referred to in the case law and textbooks and in legal practice and teaching as the law of contract, which implements the underlying principle in a particular way. Referring to this body of law does not involve invoking or applying an underlying principle, and, in the way suggested above, it can be applied without any examination of the principle.

One might instead wish to refer to a putative or hypothetical contractual claim, meaning a claim that is not available under the rules as they stand, but would be available if the contractual principle that agreements should be performed were given effect through a modified body of rules. Here the expression is used in the true justificatory sense. The conventional-justificatory sense is apt for the purpose of identifying the established rule or body of rules, whereas the true justificatory sense is apt for the purpose of invoking the underlying principle itself or some interpretation of it.

Similarly, one might argue that a certain claim actually recognised in the law, though not conventionally described as contractual, is *really* contractual and ought to be so treated, because its true basis is the contractual principle that agreements should be fulfilled. It is certainly arguable that there are claims based on this principle that are conventionally treated not as part of the law of contract, but as part of the law of equity,[16] or the law of restitution or unjust enrichment,[17] or even the law of tort.[18] If this is the case, these claims are in the true justificatory category of contract, though not the conventional-justificatory category. I will describe as 'false differentiation' the application of the same principle in different guises through different conventional-justificatory categories. The effect of this may be to apply different rules to equivalent cases. It may be that there are material differences that justify the different treatment, but the effect of the false differentiation is to conceal this question. False

[16] Below p-.

[17] Below p-.

[18] Possible examples are *Hedley Byrne v Heller* [1964] AC 465 and *Junior Books v Veichi* [1982] 3 WLR 477. See AJE Jaffey, 'Contract in tort's clothing' (1985) 5 *Legal Studies* 77.

differentiation is a form of incoherence arising from an error of analogical reasoning, and in particular from a classificatory error, arising from the divergence of the conventional-justificatory category from the true justificatory category.

Sometimes, where a claim is denied in, say, contract because of a restrictive rule, allowing a claim under a different category is thought of as a skilful common law technique to develop the law whilst respecting the existing law of contract. An example might be a case where a court denies a claim because of the rules of privity or consideration, which it insists cannot be modified, but then allows a claim in another category, though the only underlying basis for a claim is the agreement and the principle that agreements should be kept.[19] Here the false differentiation amounts to subversion of the existing law. Although the conventional-justificatory category of contract may be unaltered, the law based on the true justificatory category has been developed. This is not of course to say that the law should not be developed; the point is that, if it is open to the courts to develop it, they should be able do so without creating incoherence in this way.

Another type of incoherence is 'false assimilation', where issues that are different in material respects and should be governed by different principles are treated as if they were the same in relevant respects. Some legal fictions are cases of false assimilation. The notorious 'implied contract' fiction involved treating a claim as contractual, or 'quasi-contractual', even though it was not based in any way on the principle that agreements should be enforced. For example, a claim to recover a mistaken payment was said to be based on an

[19] Below p--, --.

implied agreement to repay the money, though clearly the recipient of a mistaken payment has not agreed to repay it, and the underlying justification for such a claim does not lie in the contractual principle that agreements should be enforced. There is a fiction, because the claim is supposed to be based on an agreement and yet there was no agreement, and this attributes a false justification to the claim and obscures its true basis. The fallacy is particularly clear where a claim is denied for a reason that is really applicable only if the claim is genuinely based on agreement, for example the defendant's lack of contractual capacity.[20]

In other cases, it may not be as easy to say whether there is really a fiction. The problem is how to distinguish a fiction from a sound analogy. In the case of the mistaken payment as an implied contract, there is no sound analogy and the fiction is obvious. But consider the claim for payment for mistakenly-provided services, which is sometimes equated with the claim to recover a mistaken payment on the ground that both are claims to recover an invalid or vitiated transfer.[21] This is an apt description of the latter, but ostensibly, one would think, not the former. As a matter of ordinary English usage, one would think that providing a service or doing work is not a transfer, and being paid for it is not the recovery of a transfer. But the literal meaning is not the issue (though it may reflect a relevant moral distinction). Is it a fiction to treat the claim in respect of mistaken services as a claim to recover a transfer? Or is it a case of extending the legal meaning of a term as part of the development of the law

[20] As in the House of Lords decision in *Sinclair v Brougham* [1914] AC 398. The basis of the claim to recover a mistaken payment is often now said to be the principle of unjust enrichment, though in my view it falls in the justificatory category of property: below p-.

[21] As to invalid and vitiated transfers, see below -.

through sound analogical reasoning? It depends whether the analogy between the two claims is indeed sound, which here means whether the two claims fall in the same justificatory category. Sometimes this may not be easy to say. In my view, they fall in different justificatory categories, though many commentators treat both cases as falling in a justificatory category of unjust enrichment.[22]

False differentiation and false assimilation are liable to occur or go unnoticed where analogical reasoning is conducted with inadequate theoretical ascent. They can be corrected by analogical reasoning at a higher level of theoretical ascent, spanning different conventional-justificatory categories. Of course, these issues are liable to be controversial, and the examples suggested above are intended as merely illustrative.

What are the justificatory categories of private law?

It is in principle easy to identify conventional-justificatory categories of private law by reference to ordinary usage, as the recognised categories used to provide a framework for presenting and arguing claims and expounding them in the standard works. However, conventional-justificatory categories can change; analogical reasoning can create them and it can mould them and eliminate them. Such changes reflect the practical success of arguments, in the academic literature and in the courts, over particular cases or categories of claim. But it remains open to argument which conventional-justificatory categories are genuine justificatory categories, based on a genuine justifying principle, and whether some other genuine justificatory category has not been recognised.

[22] Below -.

Contract is a clearly established conventional-justificatory category and I will assume that it is a true justificatory category based on the principle referred to above. The traditional view is that there are a series of distinct conventional-justificatory categories of torts, such as trespass, nuisance, defamation and conversion, as well as the law of negligence, whereas the modern tendency is towards recognising a single conventional-justificatory category in the form of the law of negligence, which has subsumed or is capable of subsuming the other categories. On this approach, the statement in *Donoghue v Stevenson* that 'there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances',[23] marked the beginning of a process that should encompass other recognised torts. This is how I interpret the debate over whether there is or should be a law of torts or a law of tort.[24] The question is whether there is a single fundamental principle of tort law, along the lines of the neighbour principle, that can generate ostensibly different types of tort in different types of standard situation,[25] or a number of distinct and irreducible principles accounting for the separate torts. I do not have to address this issue, but I will generally assume that there is a single justificatory category of tort. In chapter three, I will argue that there is a justificatory category of property in private law, which will involve distinguishing this concept of property from others.[26] It is doubtful whether there

[23] [1932] AC 562, 580, per Lord Atkin.

[24] See eg Bernard Rudden, 'Torticles' 6/7 *Tulane Civil Law Forum* 105 (1991-92). This ancient debate appears to have been revived recently: see Nicholas J McBride & Roderick Bagshaw, *Tort Law* (Harlow, Longman, 2nd edn 2005), 21.

[25] See also below --.

[26] I suggest a fourth category, below p--

is a conventional-justificatory category of property in the common law, though possibly equity has recognised one.

In general, it seems to me helpful to associate a justificatory category of private law with a particular type of practical problem involving a conflict of interests.[27] For example, the making and performance of agreements, which contract law facilitates, helps to overcome coordination problems. Two parties might refrain from carrying out a mutually beneficial exchange of goods or services for payment because neither is willing take the risk of acting first and finding that the other does not reciprocate. The moral principle that parties should keep their agreements came to be recognised and developed as a means of overcoming this problem. Thus one might say that the justificatory category reflects a functional category, meaning a type of practical problem that arises from features of human nature and social circumstances. Similarly, as a functional category tort law is concerned with the problem of the conflict between the interest of one person in being free to carry out an activity and the interest of another in not being harmed by it. The principle of reasonable care is a distinctive type of justification for a claim, which provides a possible solution to the problem.[28]

[27] See further below --.

[28] 'Functionalism' is sometimes understood to refer to an approach that avoids theoretical and conceptual questions by concentrating on the practical problems faced by the law. Although functionalism in this sense helpfully emphasises the need for a proper understanding of the facts in issue it cannot escape the traditional problems of legal reasoning.

Some objections to justificatory categories

One objection to justificatory categories might be that a category such as contract or tort cannot be based on a general moral principle because the law should not simply enforce moral principles; and furthermore it is apparent that the law does not do so – for example some agreements and promises are not legally enforceable though they are morally binding.[29] It is true that the law does not simply enforce moral principles as such. Various considerations can influence the way in which and the extent to which a general moral principle is given effect in the law, and there are controversial questions concerning the status of such principles, and whether they should be understood as part of the law or distinct from it though relevant to legal reasoning.[30] But, whatever the problems these issues raise, there seems no reason to think that they undermine the possibility of bodies of law based on general moral principles and forming justificatory categories as suggested above.

Another objection might be that underlying principles of the sort mentioned above are too vague and too controversial to be of any practical relevance.[31] It is inevitable that there will vagueness in the principle and disagreement about how to interpret and implement it, but they do not undermine the role of justificatory categories. The underlying principle is not applied directly to a set of facts to determine the legal position; indeed, as the discussion above shows, for a justificatory category to function in the way described it is not even necessary for it to be explicitly considered or interpreted. It is necessary

[29] Hugh Collins, *Regulating Contracts* (Oxford, OUP, 1999), 34.

[30] Referred to by Dworkin as the concept of law in the taxonomic sense: above n-, 4.

[31] I take this to be one of the arguments in Waddams, above n[1], especially in chs 1, 11.

only that there be an assumption that the category is based on some such principle, and the character of the category as a justificatory category, and its concomitant role in legal reasoning, reflects this assumption.

A rather different objection is that to characterise an established body of law in terms of a general principle, or a certain interpretation of a general principle, is necessarily selective, because it involves endorsing some recognised rules and discarding others as mistaken because they cannot be understood in terms of the general principle. Thus the law as it stands is inevitably misrepresented, and at the same time distorted by any form of classification.[32] But, to the contrary, the existence of an underlying principle is necessary to explain the character and function of categories like contract and tort. This does not mean that the established rules of the category are fluid or open to the extent that the underlying principle is controversial. This is the difference between the established rules, which constitute the conventional-justificatory category, and the underlying principle itself. The underlying principle may be invoked to solve problems where the law is unsettled or incomplete. Where this is the case, the law can certainly evolve through analogical reasoning, but whether this distorts the law, or straightens it out and develops it, depends on whether the analogical reasoning is sound, which is itself of course liable to be controversial.

It might also be suggested that recognising a category based on a general principle is liable to engender excessive uniformity, concealing important differences between different types of case.[33] For example, in contract there are important differences between an ordinary sale of goods contract, a contract of

[32] Waddams, above n1, 222.

[33] eg Collins, above n-, 47.

employment, and an agency contract. But there is nothing in the idea of a justificatory category to preclude differentiation between different types of case within the category. In different types of situation a general principle can have different implications, or be faced with different countervailing considerations. Consistent application of the principle is consistent with the different treatment of different types of case. By the same token, it is possible that parts of the law that differ considerably in matters of detail may prove to be derived from a common principle: this is one view of tort law, as mentioned above. It is also liable to happen where as a result of false differentiation analogous issues are dealt with in different conventional-justificatory categories.

Some discussions of classification in the law seem to be based on a quite different picture of the law from that assumed above. On this alternative view, the law does not consist of discrete bodies of law supported by distinct moral principles, but is instead something in the nature of an undifferentiated or homogenous mass, so that claims differ from each other in many different ways, to a greater or lesser degree, and are collected into categories only for convenience in teaching and administration.[34] The content of the categories is just an historical accident and is arbitrary. These categories are 'purely

[34] Some of the following seem to contain suggestions along these lines: Stephen Hedley, 'Unjust Enrichment as the Basis of Restitution – an Overworked Concept' [1985] *Legal Studies* 56-58; Patrick Atiyah, *Essays on Contract* (Clarendon Press, OUP, 1986), 48; Peter Cane, *The Anatomy of Tort Law* (Hart, 1997), 198, rejecting a 'dispositive' role for classification in favour of an 'expository' role; Tony Weir, *Tort Law* (Oxford, Clarendon Law Series, OUP, 2002). Sceptics about issues of justification are naturally prone to understand categories as conventional. Cf Collins, above n-, 43.

conventional' categories;[35] their names are simply convenient labels for a body of law and the claims that arise under it, for the purposes of identification and exposition. They can have no role in legal reasoning. This sort of understanding is suggested by the statement that 'tort is what is in the tort books, and the only thing holding it together is the binding'.[36]

This seems to me a quite implausible view of the law, and of categories such as contract and tort. If contract and tort were correctly understood as purely conventional categories, it would be difficult to understand the way they operate in the law or why there are sometimes hard-fought arguments over the characterisation of a claim as a contract or tort claim or some other type of claim; and it would also be puzzling that these categories or closely analogous categories are recognised in quite different legal systems.

Spurious justificatory categories

It is in practice possible for there to be a recognised conventional-justificatory category that is not founded on a genuine justifying principle at all – a spurious justificatory category. This is possible because of the way a conventional-justificatory category arises and functions in analogical reasoning. As suggested above, cases on unsettled law are liable to be allocated to a conventional-justificatory category, bringing them under a framework that determines in general terms how they are addressed and resolved, without any consideration of the underlying principle or any theoretical understanding of the category.

[35] Or 'nominal' categories: see Moore, *Placing Blame*, above n6.

[36] Weir, above n-, ix.

It is easy to see that some possible categories cannot possibly be genuine justificatory categories. For example, the category of 'claims arising on a Tuesday' clearly cannot constitute a justificatory category, because the nature of the category is unrelated to the reason why the claim arises. It is impossible to imagine such a category becoming established as a conventional-justificatory category. In other cases, it may not be easy to say whether a category is a genuine justificatory category.

It was at one time argued that contract claims, properly understood – ie, in the light of their true justification – are not based on the principle that agreements should be performed, but are either tort claims based on a duty of reasonable care or restitutionary or unjust enrichment claims based on a principle of unjust enrichment. This was the 'death of contract' theory.[37] The argument can be understood to be that there is no true justificatory category of contract – presumably not because there is no principle at all along the lines of the contract principle, but because it is taken to be irrelevant to the law – and accordingly sound analogical reasoning should lead the rules of contract law to be absorbed into what are implicitly the true justificatory categories of tort and unjust enrichment. More recently, this argument has fallen out of fashion, and contract and tort (rightly in my view) remain distinct conventional-justificatory categories.[38]

[37] Or the 'contract as tort' theory: see Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, OUP, 1979) and Grant Gilmore, *The Death of Contract* (Ohio, Ohio State University Press, 1974).

[38] Some scepticism is still expressed about whether contract and tort are distinct categories: see eg Andrew Robertson, 'On the Distinction between Contract and Tort', in Andrew Robertson, ed., *The Law of Obligations* (London, UCL Press, 2004). It is sometimes said that the distinction

The law of equity sometimes seems to be understood and to function as a conventional-justificatory category, so that a judge might say ‘this claim arises in equity, not in contract’, as if to imply that equity is an equivalent sort of category. The effect of the substantive fusion of equity and the common law (if it comes about) will then be to eliminate a conventional-justificatory category, and some of the opposition to substantive fusion seems to be based on the idea that equity is a genuine justificatory category. It seems to me clear that, insofar as equity operates in this way, it is a spurious justificatory category. This issue is discussed in chapter four.

In modern times, many commentators have argued strenuously for the recognition of a category of restitution or unjust enrichment law. The argument has been that historically there were various isolated bits of the law all concerned with claims arising from the receipt of a benefit by the defendant D, which are all, properly understood, based on the same general principle, namely the principle of unjust enrichment. Consequently these fragments should be united, for the sake of coherence, into a single category of law. I will refer to this argument as the ‘theory of unjust enrichment’. It seems clear that this proposed category is intended as what I have called a justificatory category, and that it has developed by analogical reasoning along the lines suggested above. It now seems

---

is illusory because although contract is in principle concerned with ‘voluntary obligations’ and tort with ‘involuntary obligations’, often a party’s legal position in contract does not depend on what he actually agreed to do. It is true that many issues that arise under a contract are not provided for by any actually agreed provision – it is impossible to make provision for every contingency. But when this problem arises it is addressed under a framework based on the principle that agreements should be enforced.

to have attained the status of a conventional-justificatory category,[39] and its arrival has displaced the law of 'quasi-contract', which was at one time a conventional-justificatory category but has now almost completely disappeared from the case law and textbooks.

But is unjust enrichment a true justificatory category? It depends on whether there is indeed a justifying principle of unjust enrichment. It is not obvious whether this is the case or not. This is certainly not like the case of 'claims arising on a Tuesday' because the fact that D received a benefit is clearly relevant to the justification for the claim. But in the large and expanding literature on unjust enrichment, and in the case law, though the principle is often invoked, there is curiously little consideration of what exactly the principle is. To give a name to a supposed principle is not to formulate it. And as pointed out above, a category can be recognised and operate as a justificatory category without the need for the principle to be formulated and applied. In my view the recognition of the law of unjust enrichment as a justificatory category is a mistake. This will be discussed in chapter eight.

It seems to me that enrichment is an event or state of affairs that can be relevant to different types of claim, arising by virtue of different principles. It may be a relevant fact in a claim in contract law or in property law, as considered in later chapters, and the significance of the enrichment and the way it is analysed is liable to differ in these different categories because of the different bases for the claims. In this respect enrichment is like the concepts of reliance and loss. These are also relevant in different ways in different justificatory categories by virtue of different underlying principles. If this is right, and there is

[39] Below p.

indeed no genuine principle of unjust enrichment, this confirms the point made above that a category can function in practice as a justificatory category in analogical reasoning without any deep examination of the underlying justifying principle, that is to say, without any theoretical ascent.

A spurious justificatory category is a source of incoherence, including false differentiation and false assimilation and legal fictions. The effect of recognising a spurious justificatory category is to subject to uniform treatment under a common framework claims that, properly understood, come from different justificatory categories and should be treated quite differently. At the same time it may have the effect of treating some claims differently from analogous claims in other genuine justificatory categories. The signs of a spurious justificatory category are a lack of evident rationale for the rules, and a tension between what seems important or relevant to a claim and the issues that the law actually raises; in short, opacity, and artificiality or unnecessary complexity. One would expect spurious categories to be exposed and eliminated over time through analogical reasoning. But it is understandable that a spurious justificatory category should arise and persist. As discussed above, fundamental issues concerning the nature of a category are not necessarily addressed at all. Also, there may be good reason to be slow and cautious in recognising or eliminating categories. Even if it is clear what the position ought to be, any dramatic change of this sort is liable to involve an enormous amount of reinterpretation of established terminology and concepts.

SOME OTHER TYPES OF CLASSIFICATION

There are other types of classification that are quite independent of classification by justificatory category.

Classification by remedy

A remedy is a measure ordered by a court in satisfaction of a claim. There are several different types of remedy, for example compensation, injunction and specific performance, restitution of goods or money, satisfaction of debt, reasonable payment for goods or services (quantum meruit or quantum valebat), etc.[40] Claims can be classified according to the type of remedy that is sought through the claim. This is clearly different from a classification according to justification. It may be that claims having a certain type of justificatory basis will always lead to a certain type of remedy, or that a certain type of remedy always arises out of a certain justificatory category, but the two are not the same and there is no reason to assume that they are.

However, there seem to be cases where the two are conflated, where a remedy is taken to define a justificatory category: this will be referred to as the 'remedy-as-justification' fallacy, and is discussed further in the next chapter. The fact that two claims are both claims for a certain type of remedy provides no reason for treating them as analogous in the sense that they should be subject to a common framework for determining when a claim should arise, which depends not on the remedy but on the justification of the claim. The old implied contract fiction mentioned above reflects this type of fallacy. The remedy for a claim for the payment of a contractual debt is an order to repay a sum of money. Similarly,

[40] There are other measures that are loosely though not correctly described as remedies, including punitive damages, as discussed, below pp --.

if C has made a mistaken payment to D, C's claim is for the repayment of a sum of money. The remedy is the same or similar, though the justificatory category is different. In the former case the justificatory category is contract, whereas in the latter case it is clearly not contract, though it remains controversial what it is: as mentioned above, it is now commonly said to be unjust enrichment. It seems that it was because the remedy sought was the same in the latter case that the claim came to be treated as analogous with respect to its justification. Thus false assimilation, in the form of a legal fiction, resulted from the remedy-as-justification fallacy.

In my view, the modern law of restitution or unjust enrichment is based on the same type of error. The law developed as the law of restitution, which appears to be a type of remedy, namely the recovery of transfers of property or money, though it has come to be used to include the remedy of reasonable payment for services or for the use of property.[41] Thus one can identify a remedial category of restitution claims. More recently it has become common to refer to the law of unjust enrichment, which appears to be intended as a justificatory category based on a principle of unjust enrichment, in accordance with the theory of unjust enrichment as explained above. But if, as suggested above, this is a spurious justificatory category, it appears that one factor behind its recognition is the conflation of the remedial category with a justificatory category, and if so it is an example of the remedy-as-justification fallacy.

[41] Below p-.

Procedural classification

The ostensible difference between criminal law and civil law is that they are enforced through different court systems, and so they can be said to be procedural categories.[42] It must presumably be appropriate for civil and criminal law to be administered separately because of some more fundamental distinction that calls for different procedures. Thus one would expect a procedural classification to be parasitic on some other type of classification that justifies it. Criminal law is sometimes explained as a separate justificatory category, though this in itself does not explain the need for a different procedure. This issue will be touched on in the next chapter.

Before the Judicature Acts 1873-75, the most obvious distinction between the common law and the law of equity was that they were procedural categories in the same sense. Equity was enforced in the Chancery courts and the common law in the common law courts. Again one would think that there must be some other type of distinction between equity and the common law that justified or was thought to justify the procedural distinction. Since the procedural fusion effected by the Judicature Acts, it would seem that this underlying distinction must be the basis for the continued recognition of a division between common law and equity. Sometimes, as mentioned above, equity is treated as a distinct justificatory category. The nature of equity and its relationship to the common law remain controversial. This is discussed in chapter four.

[42] This is not a classification of claims, since there are claims only in civil law. It might be thought of as a classification of wrongs.

The old 'forms of action'

At one time, proceedings could be taken only by following one of the forms of action.[43] The forms of action were an awkward mixture of justificatory, remedial, and procedural classification. A form of action was characterised by a standard pleading formula specifying a certain set of events and circumstances, which might reflect a certain type of justification for a claim, and also a certain procedure or court system, and a certain type of remedy.

The forms of action are long gone, but possibly their influence persists. First, the forms of action promoted fictions. In order to bring a case within the form of action on a novel set of facts, these facts were equated with or deemed to constitute the facts required by the standard formula. This was a means of developing the law but sometimes it involved a fiction. A standard example is the case of the implied contract fiction mentioned above, where a claim arising from a mistaken payment was deemed to be based on an implied agreement in order to come within the relevant form of action. There may still sometimes be an undue respect for the use of fictions as a tool for developing the law, or, it might be better to say, a tendency to confuse fictions and analogies (ie sound analogies). In making an analogy, the court equates two sets of facts on the ground that they are materially the same in the light of underlying principle, for example by bringing them under the same justificatory category. In practice, it may not be clear, at least in the short term, whether a decision is based on a fiction or a sound analogy, because it may remain obscure or controversial what

[43] See generally Maitland, *Forms of Action* (1936). The forms of action were largely abolished by the Common Law Procedure Act 1852.

the real justification for a decision is. By legitimating fictions the forms of action obscured this question and so inhibited sound analogical reasoning.

More particularly, in employing a fiction under the forms of action the court equated a new set of facts with a standard formula as a means of awarding the standard remedy. If the analogy was not justifiable, and there was a fiction rather than sound analogical reasoning, this would also be a case of the remedy-as-justification fallacy. In the modern law there may still be a tendency to emphasise remedial categories at the expense of justificatory categories, and to conflate the two, leading to the remedy-as-justification fallacy.

Source-based classification

One can also classify by source or type of authority, ie into statute, common law and custom.[44] This is of course a crucial distinction for some purposes, because of the power of Parliament to override the common law. But it does not raise any general problems for present purposes or loom large in private law.

CLASSIFICATION BY MODALITY OR NORMATIVE TYPE

Modalities of legal relation

Many rules impose a duty on D for the benefit of C, for example a duty of reasonable care or a contractual duty of performance. In such cases, one can say that there is a right-duty relation between the parties, C's right being correlated with a duty of D's. (Some would take issue with the idea of legal relations or correlated rights and duties – this issue will be considered briefly in the next

[44] Again this is not a classification of claims; it is usually understood as a classification of rules. Cf above n6.

chapter). Rules can involve other types of legal relation. For example, a rule may create a power-liability relation. If A has a power vis-à-vis B, A can alter B's legal position by acting in the prescribed way. B has a correlative liability, ie, a susceptibility to the alteration of his legal position. There are, for example, powers to make a contract, to waive a claim, and to dispose of property or license the use of property. Another type of legal relation is where A has a liberty vis-à-vis B. A has a liberty to do X vis-à-vis B if A does not have a duty to B not to do X. For example, A might have a liberty to enter into competition with B, or, by virtue of a licence from B, a liberty to cross B's land.[45] Hohfeld's famous work set out a classification of these types of legal relation.[46] I will refer to them as normative types or 'modalities'.

Distinguishing between different types of modality is crucial to understanding and formulating rules with clarity and precision. This is illustrated by an example of Hohfeld's.[47] Hohfeld pointed out that the term 'right' is not used in a uniform sense. In a strict sense, A has a right against B when B has a correlative duty. Hohfeld used the expression 'claim-right' to refer to this. Sometimes instead A is said to have a right against B when he has a liberty vis-à-vis B. Say that A sets up in business and then subsequently B sets up in competition and his competition damages A's business. A argues that he has a

[45] B can be said to have a 'no-right', so the relation is 'liberty-no-right': Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (David Campbell and Philip Thomas, eds, Aldershot, Ashgate, 2001), originally published (1913) 23 *Yale Law Journal* 16 and (1917) 26 *Yale Law Journal* 710.

[46] Hohfeld, *ibid*. Hohfeld referred to the elements of legal relations – right, duty, liability, power etc. – as 'fundamental conceptions'.

[47] Hohfeld *ibid*, --; Nigel E Simmonds, Introduction, in Hohfeld, *ibid*, xix.

right to carry on business, and therefore that B owes him a correlative duty not to damage his business by competing with him. The argument equivocates between two senses of 'right'. A has a right to carry on business only in the sense that he has a liberty to do so. This means that he does not act wrongfully by carrying on business – he does not breach a duty to B (or anyone else), and B does not have a right that A should not carry on business. But it is quite a different thing to say that A has a right to carry on a business in the sense that he has a right that B not interfere with his business by carrying on a competing business. Generally this is not the case, because B also has a liberty to carry on a business. The example shows that formulating a rule clearly and precisely involves identifying its modality, which in this case means distinguishing between different usages of 'right'.

Modalities are not the same as justificatory categories. The principle behind a justificatory category is implemented through a body of rules of various modalities. For example, in tort law there are duties of care, and there can be a power to waive a duty of care. In contract law, there is a power to make an offer, and a power to accept an offer; and there can be a contractual duty of performance. Modalities are concepts employed in formulating a rule, but they are not tied to a particular type of principle or justification.[48]

Modalities and justificatory categories play different roles in legal reasoning. Classification by justificatory category contributes to analogical reasoning where the law is unsettled, as discussed earlier. Hohfeldian analysis in terms of modalities contributes to clarifying the meaning of legal rules, but it does not give any guidance on how to resolve unsettled law through analogical

[48] Cf the discussion of the 'bundle of rights' concept of property, below p--.

reasoning, except by way of clarifying the meaning of existing and proposed formulations of a rule.

It is helpful here to refer to the distinction employed in ethical theory between 'thick' and 'thin' normative concepts.[49] Thin normative concepts are formal or abstract concepts for expressing normative propositions. They are not tied to particular types of situation or moral principle, and can be employed in expressing normative propositions that vary widely in terms of their content and justification. Concepts that are Hohfeldian modalities such as right, duty, liability, power are thin normative concepts.

Thick normative concepts are used to express normative propositions concerned with particular types of situation and behaviour. Typical examples are courage, treachery, cruelty and selfishness. Their characteristic feature is a 'union of fact and value':[50] the concept is a certain type of character, conduct, state of affairs, etc, but it also carries a moral significance and its use conveys a moral judgment. There must be a moral principle that lies behind the concept, by virtue of which certain facts have this moral significance, though normally the moral principle remains tacit and people who use and understand the concept may not find it easy to formulate a principle to go with the concept. Indeed there is liable to be controversy over exactly what the principle is.

Concepts such as contract and tort that form justificatory categories are tied to particular principles. Insofar as the justificatory category has been reduced to and operates simply as a body of rules applied to the facts, only thin concepts

[49] See Bernard Williams, *Ethics and the Limits of Philosophy* (London, Fontana Press, 1985), 129.

[50] *ibid.*

are involved, and the same is true where an underlying principle is subjected to interpretation and analysis. But where a judge is presented with a claim on unsettled law and assimilates it to a justificatory category as a matter of impression, it appears that he is applying the underlying principle without explicitly referring to it or formulating it, by virtue of an understanding of the fact situations that instantiate it, and this implies that there is a thick concept of contract or tort at the heart of the justificatory category.[51]

Two types of claim

The usual understanding is that claims in private law are based on primary right-duty relations. A primary right or relation is to be contrasted with a remedial right or relation. The primary relation between C and D is the relation by virtue of which a claim arises for C against D. For example, D may owe C a primary duty of care in tort, or a primary duty of contractual performance. If D commits a breach of the duty, a remedial relation arises, typically consisting of a right of C's to compensation and duty of D to pay compensation. C's claim is his remedial right to compensation.[52] (The distinction between primary and remedial

[51] Generally ordinary thick normative concepts like the ones mentioned above carry an implication of either praise or condemnation, because the underlying principle is a principle concerned with how one ought to behave. But it is not necessarily true of these legal concepts that the implication is of breach of legal duty or legal wrongdoing. (It may be true of tort). There is no legal equivalent to praise. For example, in the case of contract, the significance of the set of facts described – the contract or agreement – is that it involves the exercise of a normative power to create a duty or other normative relation.

[52] In fact a claim or remedial right to compensation is better understood as a power correlated with a liability, not a right correlated with a duty: see Peter Jaffey, 'Hohfeld's Power-

relations and the relationship between them is considered in more depth in the next chapter.)

In this type of case, the claim arises from a wrong, a wrong being a breach of duty. It is often thought that all claims in private law are wrong-based, or, in other words, that all primary relations in private law are right-duty relations. But take, for example, the well-known rule in *Rylands v Fletcher*.[53] Under the rule, if a dangerous thing kept by the defendant D on his land – eg a dangerous animal or water in a reservoir – escapes and causes harm to a neighbour, the claimant C, C has a claim for compensation, and the claim does not depend on D's having failed to act in some way to prevent the escape, which he may have been incapable of doing. If D has a duty, it is a 'strict liability' duty, meaning a duty that D can breach without fault because the performance of the duty is not under his control. D simply has a duty that harm not be caused in this way, whether or not there is anything he can do to prevent it. Strict liability duties have long been controversial. The objection is that a rule that imposes a duty should act as a genuine prescription or requirement of action for the people it regulates, and a strict liability duty does not do this because it may not be possible for D to perform it, and when a claim arises against D it cannot be because he failed to act as required. Nevertheless some commentators insist that strict liability duties are quite justifiable, and regard the rule in *Rylands v Fletcher* as an example of a rule creating a strict liability duty.

Liability/Right-Duty Distinction in the Law of Restitution' (2004) 17 *Canadian Journal of Law & Jurisprudence* 295; below --.

[53] (1868) LR 3 HL 330.

I will not address the arguments over strict liability duties directly, but I will adopt an alternative approach that does not rely on them. On this approach, I will understand 'duty' in the 'subjective' sense to mean a genuine prescription or requirement for action (or inaction), so that a wrong or breach of duty involves fault, and where D is subject to a claim arising from a wrong it is because he has failed to act as he was required to act by law.[54] This is not to deny that there are claims that do not arise from wrongs understood in this way; I will say that, properly understood, some claims, including the claim arising under the rule in *Rylands v Fletcher*, do not arise from a primary right-duty relation at all, but instead from what I will call a primary 'right-liability' or primary liability relation.[55] A primary liability relation specifies a contingency, an act or event whose occurrence generates a claim, though the act or event is not a breach of duty or wrong, for example the infliction of harm by the escaping thing under the rule in *Rylands v Fletcher*. A primary liability is not a strict liability duty, though the expression 'strict liability' is ambiguous as between a primary liability and a primary strict liability duty. The primary liability claim is not based on a breach of duty at all: D was at liberty to act as he did.[56] It is not that D acted wrongly though without fault.[57]

[54] Subjective and objective duties are considered again below --.

[55] See also Peter Jaffey, 'Duties and Liabilities in Private Law' 12 *Legal Theory* 137 (2006).

[56] Or at least, if D was not at liberty to act in this way, this is not relevant to the claim.

[57] It goes without saying that in the expression 'right-liability', 'right' is not used in the strict sense of Hohfeld's 'claim-right', in which it correlates with a duty; and 'liability' is not used to mean susceptibility to a power, as in the case of a liability correlated with a power. But this is just a matter of terminology. It does not involve any departure from Hohfeld's 'correlativity thesis': on the correlativity thesis, see Matthew H Kramer, 'Rights Without Trimmings' in

Consider another example, from contract law. In contract, there is normally said to be a duty to perform in accordance with the agreement, and a correlative right to performance, ie a right-duty relation. But many aspects of contract suggest that this may not be the case. Often if there is a contractual duty it must be a strict liability duty requiring of D something that he may not be capable of doing; also, often a contracting party is not compelled to perform his contract by order of specific performance, even though there is no hardship involved in doing so; and in other respects a contracting party is not treated as having acted wrongfully by not performing the contract. This suggests, as has often been pointed out, that there is, in the ordinary case, no primary duty to perform the contract. One might object that if there is no duty there can be no breach of duty and therefore no contractual claim at all; but a contract claim can be understood as a claim arising from a right-liability relation. This case will be considered again in the next chapter in connection with the relationship between primary and remedial rights.

Another case will be important in later chapters:[58] this is the case of the claim to recover an invalid transfer. Say C owns money or property that comes into D's possession or control without a valid transfer by or on behalf of C, because of a mistake by C or his agent, say, or because the property was taken and passed on by an unauthorised third party. The transfer is invalid because there was no valid exercise of the owner's power of transfer by or on behalf of C,

---

Matthew H Kramer, NE Simmonds & Hillel Steiner, *A Debate Over Rights* (Oxford, OUP, 1998), 24-29. However, it does contradict what one might call the 'completeness thesis', that Hohfeld's scheme can 'be employed to classify and clarify all empirical phenomena that might be found': Kramer, *ibid*, 30.

[58] Especially chapters three and six below.

and as a result of the invalid transfer C has a claim against D to recover the money or property or its value. But it can hardly be said that the transfer to D, which was not effected by D or even within his control, and may have been completely outside his knowledge, was a breach of duty by him. C's claim to recover his property or its value arises from a primary liability relation. More generally, the claims that are often described as unjust enrichment or restitution claims arise from the receipt of a benefit, including the transfer of money or property, and they are based on primary right-liability relations.

A primary right-liability relation can be understood as a direct allocation of risk, in the sense that it imposes on D rather than C the responsibility for a certain risk, but without imposing a duty on D to prevent the risk materialising. If the risk materialises D is subject to a claim, but not by virtue of having committed a wrong. On this understanding a contract allocates risk concerning the activities specified by the agreement rather than imposing duties to perform the agreement; and a right of ownership, insofar as the type of claim mentioned above is concerned, subjects potential recipients of the property to the risk of a claim to recover the property or its value, and in both cases it is this allocation of risk that constitutes the primary right-liability relation.

I will take the view that in private law there are two modalities of primary relation, and two corresponding types of claim. Where the primary relation is a right-duty relation, the claim arises from a breach of duty or wrong by D, meaning that D has failed to comply with a requirement of action imposed by the law. Where the primary relation is a right-liability relation, the claim arises from an event that is not a wrong in this sense, but is specified as a contingency, the risk of which is borne by D rather than C. This may be an act by

D, but if so the claim does not depend on characterising the act as a wrong and, so far as the primary relation is concerned, D was at liberty to commit it.

Negligence in tort law is an interesting case that will arise later.[59] There is normally said to be a duty of reasonable care, requiring D to reach a certain 'standard of care'. This is a right-duty relation, and if D fails to reach the required standard of care he commits a breach of duty. But the traditional position (though often criticised) is that the duty is 'objective', meaning that the standard of care required of D depends not on D's own particular characteristics but on the characteristics of a 'reasonable person' in D's position. This means that for some people the required standard may be very burdensome or even beyond reach, and the duty is a strict liability duty in the sense above. This suggests that the primary relation may not be a right-duty relation at all, but a right-liability relation.[60] On this basis, if D fails to reach the specified standard of care he incurs the risk of liability for any loss caused, but he has not (by virtue of this legal relation) committed a breach of duty. The standard of care allocates risk rather than imposing a duty. This is consistent with the approach of some tort scholars who regard the duty of care in tort not as a genuine duty but merely as a condition of liability.[61] Possibly the two modalities of primary relation, right-duty and right-liability relations, are both capable of arising in the justificatory category of tort law based on a general principle of reasonable care

[59] Below

[60] Cf Neil MacCormick, 'The Obligation of Reparation' in *Legal Right and Social Democracy* (Oxford, Clarendon Press,1982).

[61] See the comments in McBride & Bagshaw, above n-, 20, criticising "duty-sceptics".

or responsibility. This is the view taken with respect to contract law in the next chapter.

Some objections to primary right-liability relations

There are some possible misinterpretations of primary right-liability relations and objections to them. As mentioned above, primary liability relations are sometimes presented, or, on my view, misrepresented, as strict liability duties.[62] Alternatively, to avoid the notion of a strict liability duty, or in recognition of the fact that D is free to do the act that generates the claim, it is sometimes said that D's only duty is the duty to provide a remedy, arising from the harm or other event that generates the claim, or, along the same lines, that D has a conditional duty to provide a remedy, the condition being the event that generates the

[62] See eg Arthur Ripstein, 'Philosophy of Tort Law', in Jules Colema & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford, OUP, 2002); John Gardner, 'Obligations and Outcomes in the Law of Torts', in John Gardner and Peter Cane, eds, *Relating to Responsibility : Essays for Tony Honore on His Eightieth Birthday* (Oxford, Hart, 2001). According to Tony Honoré, *Responsibility and Fault* (Oxford, Hart, 1999), strict liability in tort should be understood in terms of 'outcome responsibility', which is a form of allocation of risk. This approach differs from the position in the text in that (1) it is said to generate a strict liability duty, so that a claim arises from a wrong, and (2) the discussion is confined to tort, and the implication is that outcome responsibility is a type of justificatory principle lying behind liability in tort, rather than a modality of relation in the sense suggested in the text. Cane appears to regard strict liability in tort as not being based on a duty: Peter Cane, 'Fault and Strict Liability for Harm in Tort Law' in W Swadling & G Jones eds, *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, OUP, 1999); Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, 25 refers to a 'not-wrong' as an event generating a claim.

claim.[63] But these formulations refer only to a remedial duty, corresponding to C's claim, and do not help to identify or characterise the primary relation by virtue of which the claim arises. If such a formulation adequately describes what I have called a primary liability claim, it would also adequately describe any claim at all, including claims that clearly arise from a breach of duty.[64]

A remedially-oriented approach along these lines is encouraged by the traditional preoccupation with remedies, arising in part from the old forms of action. It leads to a tendency to use 'duty' in an artificial or fictional way, as a verbal formula to denote that a claim will arise from a certain act or event, which disguises the difference between right-duty and right-liability primary relations.[65] It is true that the practical concern of the claimant C is whether a remedy is available on the facts, and the law can often be adequately expressed in the form 'in the event of X, C has a claim against D' without specifying whether X constitutes a breach of duty, or some other act or event that triggers a claim under a primary liability relation. But sometimes it is important to say whether

[63] One might say that D has a duty either to refrain from committing an act or to provide a remedy: see eg Hanoch Sheinman, 'Tort Law and Corrective Justice' (2003) 22 *Law and Philosophy* 21, 41. But it is not clear that this really identifies a primary relation either. Also, in some cases the claim does not arise from an act that D chose to perform.

[64] A further objection is that, as noted above, n-, C's claim for compensation is better understood as a power correlated with D's liability, not a right correlated with a duty.

[65] It is sometimes said that the availability of compensation as a remedy is the hallmark of a duty, or the 'test' of whether there is a duty. But compensation is often the appropriate remedy for a primary liability claim. The availability of 'specific enforcement' by way of an injunction or specific performance indicates that there is a duty, but sometimes specific enforcement will be impossible or impracticable. Punishment also implies that there was a breach of duty, but again is not always appropriate.

the claim arose from a breach of duty or not. In particular, as discussed in the next chapter, it may be important in connection with remedies and the relationship between primary and remedial relations.

Another reason why the primary right-liability relation is usually hidden or ignored in legal analysis may be the assumption that it is unjust for D to be subject to a claim if he has not committed a wrong.[66] Sometimes what is intended here is the different proposition that it is unjust to hold D to have acted wrongfully if he has not been at fault. This amounts to denying the legitimacy of strict liability duties, not primary liability relations.

Some writers assume that if a claim does not arise from the breach of a duty owed by D to C, there is no reason why the particular defendant D, rather than someone else, or the state, should have to provide a remedy to C. This is often expressed in terms of corrective justice. It is said that any such claim is unjust to D, because it is not based on any right of C's against D. In the context of tort law, it might be thought that if the claim does not arise from a duty owed to C its object must be 'loss-spreading', meaning reallocating losses as part of the allocation of benefits and burdens across the society as a whole, as a matter of distributive justice, so that it has the same sort of function as the system of taxation and social security benefits.[67] But this is not the implication of formulating the law in terms of a primary right-liability relation. Where there is a right-liability relation between C and D, C has a right against D. The relation represents an allocation of risk as between D and C, in accordance with the

[66] See eg Stephen A Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 *Texas Law Review* 2177, 2182-3.

[67] eg Bagshaw & MacBride, above n--, 38--.

principle behind the justificatory category in issue. The harm or other triggering event may not be a wrong by D, but so long as it remains unremedied it constitutes an injustice, as between C and D, by virtue of the allocation of risk. I will return to this point briefly in the next chapter in connection with the discussion of corrective justice.[68]

Another possible objection to primary liability relations is the assumption that if a claim does not arise from a wrong it must be based on a sceptical or reductionist approach to the law, meaning an approach that purports to eliminate the 'internal' or normative realm from the law. From the internal or normative point of view of someone subject to a rule imposing a duty on him, the duty is a requirement or prescription directed at him. The rule may be enforced by a sanction, which gives D an incentive to comply with the duty, but the effect of the sanction is distinct from the normative force of the duty itself.[69] On a reductionist approach, rules are understood as defining acts or omissions to which sanctions are attached as an incentive or disincentive, and the concept of a duty has no distinct role to play; if the expression is used, it is understood as simply describing the behaviour that will attract a sanction.[70]

---

[68] Below --

[69] One might say that there are 'primary rules of conduct', but I do not take this to mean that the rules necessarily operate in practice as a guide that is consulted by the people subject to them.

[70] This is the 'sanction theory of duty': see PMS Hacker, 'Sanction Theories of Duty,' in AWB Simpson, ed, *Oxford Essays in Jurisprudence: 2nd Series* (Oxford, Clarendon Press, 1973); John Gardner, 'Backwards and Forwards with Tort Law' in Joseph Keim-Campbell, Michael O'Rourke and David Shier, eds. *Law and Social Justice* (Cambridge Mass, MIT Press, 2005). The point can be expressed in terms of reasons for action. A sanction for the breach of a duty is a self-interested or prudential reason for action: it provides an incentive to comply with the duty.

Some schools of thought tend to deny the existence of duties for reductionist reasons. It is well-known that in the Legal Realism literature it is sometimes said that the law should be understood, from the standpoint of a subject of the law, purely in terms of the sanction he will suffer for doing something, not whether he has a duty not to do it.[71] Similarly the modern economic analysis of law sometimes appears to treat measures imposed by the court as sanctions, understood as incentives and disincentives directly influencing or manipulating behaviour without imposing any duties (except in the artificial sense mentioned above), and so is reductionist in the same sense.[72]

The primary right-liability relation does not involve a duty, but it is not reductionist. The allocation of risk does not represent merely the risk of a sanction. It is a genuine legal relation or norm or 'reason for action' for D, though it is not mandatory and does not requires certain conduct from D.[73] In this

---

On a reductionist approach, this is the only reason for action. But from the internal point of view the duty itself constitutes a reason for action, though a normative rather than a prudential one, in particular a mandatory reason for action. Thus whether the duty exists depends not on whether there is a sanction but whether there is a valid rule imposing the duty. The sanction provides an additional prudential reason to comply with the duty.

[71] This 'externalist' approach is associated with OW Holmes, *The Path of the Law* 10 *Harvard Law Review* 457, 458-61 (18--). Modern duty-sceptics in tort law are criticised by Nicholas J McBride, 'Duties of Care – Do they Really Exist?' (2004) 24 *Oxford Journal of Legal Studies* 417, and John P Goldberg & Benjamin C Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' 54 *Vanderbilt Law Review* 657 (2001).

[72] As discussed by Jules Coleman, *The Practice of Principle* (Oxford, OUP, 2001), 35; Gardner, above n--.

[73] For rejection of the idea of a claim not based on a breach of duty as being reductionist, see John Gardner, above n--.

respect it is like some other legal relations, for example the power-liability relation.

In any case, it is worth pointing out that the distinction between right-duty relations and right-liability relations, or an analogous distinction, is also recognised from a reductionist point of view. From the reductionist point of view what is significant is the different characteristic types of legal response or sanction that are appropriate in the two types of case, in respect of a wrong or breach of duty as compared to a causative event that is not a wrong.[74] I will return to some of these issues in the next chapter.

THE CONTROVERSY OVER CLASSIFICATION

Opposition to the idea of classification

As mentioned above, some commentators express a general hostility to classification in the law.[75] Such hostility should always be understood as

[74] The distinction corresponds, it appears to me, with the distinction in the economic analysis of law between 'property rules' and 'liability rules' see Guido Calebresi & A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' 85 *Harvard Law Review* 1089 (1972). A 'property rule' is a rule that protects a right by way of an injunction or by threat of punishment to compel D to act, and a 'liability rule' is a rule that protects a right only by way of compensation for loss. This is not how this distinction is usually translated into Hohfeldian relations: see eg Munzer, 27. On the suggested approach, 'property rule' is an inappropriate usage because there is no necessary link between duty and property.

[75] For a wide-ranging discussion of arguments sceptical of legal classification, see Waddams, above n-, especially chs 1, 11. See also Geoffrey Samuel, 'Can the Common Law Be Mapped?' 55 *University of Toronto Law Journal* 271 (2005); Stephen Hedley, 'The Taxonomic Approach to Restitution' in Alistair Hudson, ed, *New Perspectives on Property Law, Obligations and Restitution* (London, Cavendish, 2004).

hostility to a particular classification or to the misuse of a classification. Classification itself is part of the rational investigation of any subject matter. In general terms, classification involves identifying appropriate criteria for differentiating or assimilating amongst the elements of the subject matter, and without this it is impossible to formulate the concepts necessary to describe and understand it. In law, rejecting classification means refusing even to investigate the nature and the role of concepts such as contract, tort, property, restitution, compensation, wrongs, liabilities, and so on, and their relation to each other.

As mentioned at the start of the chapter, one source of hostility to classification may come from an association of classification with 'mechanical jurisprudence', which might suggest that a classification should operate to provide a legal solution in a mechanical or algorithmic way. It may be the misconception that a legal classification should operate in this way that is behind the feeling that it is futile if it does not do so. In the reaction against mechanical jurisprudence it has sometimes been implied that the law should be able to protect individual interests and promote the general welfare without the traditional baggage of legal concepts and classification.[76] This is another illusion. It will always be necessary to employ concepts whose meaning and significance and inter-relation need to be investigated and explained through an exercise of classification.

[76] This idea is associated with Legal Realism, exemplified by Felix Cohen, 'Transcendental Nonsense and the Functional Approach' 35 *Columbia Law Review* 809 (1935). On the need for technical terms in the law because of its 'systematicity', see Jeremy Waldron, ' Transcendental Nonsense and System in the Law' 100 *Columbia Law Review* 16 (2003).

Mutual exclusivity and justificatory categories

A particular concern in connection with classification has been the issue of mutual exclusivity.[77] It is sometimes suggested that to classify claims by reference to mutually exclusive legal categories is artificial and liable to distort and oversimplify the law. Such comments tend to reflect the implausible understanding of the law mentioned earlier,[78] as being something like a homogenous mass that has been divided up into conventional categories, purely for convenience of exposition, and not because there are actually discrete categories based on distinct principles. It would indeed make no sense to assign a new case on unsettled law exclusively to such a category for the purposes of deciding it by analogical reasoning. A judge might reasonably think that the claim at hand has something in common with various such categories and draw on considerations from all of them.

But this does not apply to justificatory categories consisting of bodies of rules that give effect to a certain general principle or type of justification. In analogical reasoning in terms of justificatory categories, the issue is whether the claim should be brought under the reach of the underlying principle, by the development of the rules that give effect to it. It would make no sense to say that a claim is partly justified under one category and partly justified under another and that these can be added together to justify a claim overall, because the underlying principles themselves cannot be combined in this way. Thus one cannot make a half-analogy with one category and a half-analogy with another

[77] Generally classification does mean classification into mutually exclusive categories, because only then can it serve the purpose of differentiating between the elements to be classified.

[78] Above --

category and find a whole claim in a hybrid category. Claims fall in a single justificatory category in a classification of mutually exclusive justificatory categories.

However, the general proposition that justificatory categories are mutually exclusive is potentially misleading without elaboration. First, there is no suggestion that there cannot be concurrent claims, ie two distinct claims from different justificatory categories that arise on a particular set of facts. Also, it might be the case that the fundamental justification for a claim is, say, the principle that an agreement should be observed, so that (on the argument above) the claim is in the true justificatory category of contract, but it is actually recognised as a tort claim in order to avoid a restrictive rule of contract law. This means that there is a mismatch of true justificatory and conventional-justificatory categories. As discussed above, it involves a form of incoherence, namely false differentiation.

Furthermore, a claim in one justificatory category can depend on the law of another justificatory category in the following sense. A contract may relate to property, as where there is a contract to transfer property. In such a case, a claim in contract may involve determining a disputed issue in property law. Conversely, a contractual right can be the object of ownership, as in the case of contractual rights to payment that function as money. Similarly, there can be a duty in tort law imposing a requirement to avoid causing damage to property, so that it may be necessary to determine the scope of a property right as part of the determination of a tort claim. In these types of case, a claim in one category presupposes the position under another. One might say that the output of one provides the input for another. But the two categories and the issues arising in

connection with them remain discrete. Some aspects of the relationships between property and contract and property and tort are discussed in chapter three.[79]

Independent dimensions of classification

A claim can fall into categories from different schemes of classification, eg justificatory categories, categories of modality, and remedial categories. Although a claim cannot be both contractual and tortious (if these are understood as justificatory categories), it could be contractual (justification), based on a wrong or duty as opposed to a primary liability (modality), and compensatory (remedy).

Some expressions are used ambiguously or inconsistently to signify concepts from different types of classification. This is true of 'property', as discussed in chapter three. Similarly with 'tort': I take this to be a justificatory category, which seems to correspond to its standard use, though as mentioned above some might say that tort law consists of several distinct justificatory categories; and some would say that it is the law concerning wrongs, whatever the basis for the duty, which characterises it as a type of modality;[80] and sometimes it seems to be defined in terms of a remedy or remedial principle.[81]

[79] Below p--.

[80] This approach is associated with Percy Winfield, *The Province of the Law of Tort* (Cambridge, CUP, 1932); see also McBride & Bagshaw, above n--, --. This approach appears to involve ad hoc exclusions of equity and contract. Samuel describes this as the 'formalist' approach, to be distinguished from the 'functionalist' approach, which as he defines it is a remedial category: Geoffrey Samuel, *Cases & Materials on Torts* (Exeter, LawMatters, 2006), 9.

[81] ie, the principle that a wrong should be remedied, as discussed below, pp--.

Also it seems that 'wrongs' may be intended as a type of modality, or as the justificatory category of tort.

If different schemes of classification are not distinguished, classification into mutually exclusive categories appears to preclude for dogmatic reasons the range of considerations that a court can legitimately take into account. For example, Waddams points out that in the well-known case of *LAC Minerals v International Corona Resources*[82] reliance, restitution or unjust enrichment, property, contract, and wrongdoing were all considered relevant, and in fact the claim was explicitly concerned with breach of confidence and breach of fiduciary duty. According to Sopinka J in that case, the law of confidential information is 'sui generis' but relies on the 'jurisdictional bases for action' of contract, equity and property.[83] It seems that for Waddams the inference to be drawn from this is that a classification-based approach should be avoided, because it would for dogmatic reasons force the court to try to resolve the case by reference to only one of these various concepts, whereas instead the court should be free to employ any or all of them in a flexible, common sense, anti-classificatory approach.[84] In fact these various concepts may well come from

[82] [1989] 2 SCR 574; Waddams, above n--, 78.

[83] At 615. Similarly Waddams says that the decision in *White v Jones* [1995] 2 AC 207 was justifiable on the basis of 'the breach of contract and the negligence when combined with considerations of unjust enrichment, public policy, and general considerations of justice': Waddams, *ibid*, 55. Waddams's understanding of *White v Jones* is criticised by Allan Beever & Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320, 333.

[84] For a similar view, see Joachim Dietrich, 'The 'Other' Category in the Classification of Obligations' in Robertson, ed., above n--, 125-6; Cane, above n--.

different types of classification so that they are not mutually exclusive. The real problem is that it is often unclear what sorts of concept are in issue. Putting an emphasis on classification requires the various concepts to be located in a scheme of classification that reveals what type of concept each is and how it relates to other concepts. Far from hindering sound analysis, this is a prerequisite for it.

Of the concepts mentioned, contract is a justificatory category, as in my view is property, as discussed in chapter three. Fiduciary law is sometimes treated as a distinct justificatory category, though in my view it is a part or sub-category of contract law, as considered briefly in chapter five. Equity is not a justificatory category though it is sometimes referred to as such, and its nature is a matter of continuing controversy. The relationship between equity and the common law is the subject of chapter four. Wrongs or wrongdoing is most obviously a modality of primary relation, though as mentioned above it might be understood to refer to a justificatory category analogous to contract, ie tort law. Reliance is a feature of the situation that is sometimes relevant to whether a claim arises – a type of relevant fact. It may be relevant to claims in contract, tort or property. But there is no reason to think that there is a distinct justificatory category of reliance, based on a 'principle of reliance'. Restitution is on the face of it a type of remedy, though it is often equated with a supposed justificatory category of unjust enrichment, based on a principle of unjust enrichment. In my view, as I have already said, enrichment is, like reliance, a feature of the situation that can be relevant to certain types of claim, including claims in the categories of contract and property, but there is no 'principle of unjust enrichment' to

support a justificatory category of unjust enrichment.[85] Sopinka J represents confidential information as a sort of hybrid or complex category. Confidential information is touched on in chapter three. In my view it is right to say that it is not itself a genuine justificatory category (or a part of one like fiduciary law), but is composed of parts from different justificatory categories,[86] though on this view it is doubtful whether Sopinka J is right to include equity along with contract and property.

[85] Below p--

[86] This point is considered below p--.